No. 8373

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

THEODORE THOMPSON,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

Brief for the Appellant

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BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE

This suit was brought to recover total permanent disability benefits under a contract of war risk term insurance which afforded insurance protection from February 1, 1918, to October 1, 1919. The case came on for jury trial on June 23, 1936, with issue joined on plaintiff's allegation that he became totally permanently disabled during the life of the policy. At the close of all the testimony defendant moved for a directed verdict on the

ground that there was no substantial evidence to support a verdict for plaintiff (R. 181). The motion was denied and an exception reserved (R. 183). Thereafter the jury returned a verdict in favor of plaintiff (R. 15), in accordance with which judgment was entered on July 18, 1936, awarding benefits from August 13, 1919 (R. 16). Defendant's petition for appeal (R. 216) and assignment of errors (R. 201) were duly filed and appeal allowed (R. 218).

QUESTION PRESENTED.

Whether there was any substantial evidence that plaintiff became totally permanently disabled during the period of protection under his insurance contract.

ASSIGNMENT OF ERRORS.

The foregoing question is raised by assignment of errors Nos. V, VI, VII and VIII (R. 212-215), as follows:

V.

> The Court erred in denying defendant's motion for a directed verdict, made at the conclusion of all the evidence, to which action of the Court defendant then and there duly excepted, as follows:
>
> Mr. MOLUMBY: No further rebuttal, Your Honor.
>
> Mr. BROWN: If the Court please, at the close of all the evidence, we desire to renew the motion for directed verdict in favor of the defendant and against the plaintiff on the following grounds and for the following reasons:
>
> 1. That the evidence is insufficient to sustain the material allegations of the plaintiff's complaint or to support a verdict in favor of the plaintiff and against the defendant, or to warrant the Court in

entering a judgment in favor of the plaintiff and against the defendant, if the jury's verdict were in favor of the plaintiff.

2. That it appears from the uncontradicted evidence herein that the only disabilities suffered by the plaintiff at the time of his discharge from the army was the loss of his left leg, which, as a matter of law, does not constitute a total and permanent disability.

3. That it appears from the uncontradicted evidence herein that the plaintiff was offered vocational training by the defendant, and that he deliberately refused to accept such vocational training and that he refused to in any manner improve himself so as to enable him to earn a living and to follow a substantially gainful occupation in spite of his handicap.

4. That it does not appear from the evidence in the case that the plaintiff made any endeavor to fit himself for any work that a one-legged man can ordinarily engage in, or to engage in any work which ordinarily a one-legged man could do.

5. That it appears from the uncontradicted evidence in this case that the plaintiff has never at any time sought from the defendant or from anyone else any medical treatment or hospital treatment for his alleged stomach trouble or for the alleged injury to his right knee or his alleged nervousness or the sickness which he claims constitutes a disability in addition to the loss of his leg; and that he has refused to accept any such treatment; and that by reason of his failure to seek or receive from the defendant such medical and hospital treatment, and his refusal to accept the same, that he cannot recover in this action for any claimed sickness or disability.

6. And on the further ground that it appears that the action is barred by the provisions of Sec. 445 of Title 38 of the U. S. Code.

The COURT: The motion is denied.

Mr. BROWN: May we have an exception, Your Honor?

The COURT: Yes.

VI.

The Court erred in refusing to give to the jury defendant's requested instruction No. 1, as follows:

You are directed to return your verdict in favor of the defendant and against the plaintiff, the defendant's exception being as follows:

The COURT: Are there any exceptions, Mr. Brown?

Mr. BBOWN: The defendant objects and excepts to the refusal of the Court to give the Government's proposed instruction No. 1.

The COURT: Very well. You may retire, gentlemen.

VII.

The evidence is insufficient to justify the verdict.

VIII.

There is nothing in the evidence in this case tending to show that at the time the insurance upon which the plaintiff bases his claim lapsed he was permanently and totally disabled.

POINTS AND AUTHORITIES

I.

There is no substantial evidence that during the life of his policy plaintiff suffered any impairment of a totally permanently disabling nature.

United States v. *Mayfield*, 64 F. (2d) 214 (C. C. A. 10th);

United States v. *Adcock*, 69 F. (2d) 959 (C. C. A. 6th);

United States v. *Harris*, 66 F. (2d) 71 (C. C. A. 4th);

Deadrich v. *United States,* 74 F. (2d) 619 (C. C. A. 9th);
United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

II.

There is evidence that he has pursued a substantially gainful occupation;

United States v. *Green,* 69 F. (2d) 921 (C. C. A. 8th);
United States v. *Steadman,* supra;
Harris v. *United States,* 70 F. (2d) 889 (C. C. A. 4th);

and

III.

An absence of evidence that he could not have pursued any of many other occupations possibly more suited to his condition.

Miller v. *United States,* 294 U. S. 435, rehearing denied, 294 U. S. 734;
United States v. *Mayfield, supra;*
Hanagan v. *United States,* 57 F. (2d) 860 (C. C. A. 7th).

ARGUMENT

THERE IS NO SUBSTANTIAL EVIDENCE THAT PLAINTIFF BECAME TOTALLY PERMANENTLY DISABLED DURING THE LIFE OF HIS POLICY.

Review of the record will reveal that although plaintiff has lost his left leg, he has used effectively a well-fitted artificial limb; that other claimed disabilities

were at most of trivial nature, and that the incurability thereof during the life of the policy was not shown. It will further appear that for more than ten years since the alleged date of total permanent disability plaintiff has pursued the occupation of farming with no attempt to do work more suited to his condition, and that in fact he has made a success of his farming enterprise.

SUMMARY OF THE EVIDENCE

At the time of his induction into service plaintiff was twenty-four years of age and had worked as a farm laborer and sheep herder for wages ranging from $50.00 to $80.00 per month during the five preceding years. He was a native of Norway, with a seventh or eighth-grade education, had come to this country at the age of nineteen, and had acquirerd only limited ability to use the English language (R. 19-20).

On October 31, 1918, while engaged in active battle, he received a severe injury to the left leg (R. 27), which resulted after several operations (R. 29) in the amputation of that limb about five inches above the knee. An artificial limb was fitted and at the time of his discharge on August 13, 1919, he was able to walk with the assistance of canes or a crutch (R. 32). The medical testimony is in accord that the amputation appeared to have been skilfully performed; that the stump was well healed, and the artificial limb well-fitted and in good condition (R. 122, 126).

Plaintiff testified that while drilling at Camp Lewis he stepped in a hole, twisting his right knee, as a result

of which he was confined to the barracks for several days (R. 20-21), and that at all times since "It affects me when I am walking. If I don't watch how I fix my foot or place my foot, it kind of hurts and grinds back in my knee. * * * there is just a kind of catch in there" (R. 21), and "It hurts by spells, once in a while" (R. 50). However, for more than six months immediately following this claimed injury he performed regular military duty, including drilling and marching, until the date of the injury to his left leg (R. 51). He has never requested or received any treatment for the right knee. An examination made the day before trial revealed that the right knee was normal in appearance and freely movable, with a localized tenderness over the inner side. Though there was no "redness or anything of that sort," the examining physician noted a feeling of something slipping when the knee was moved (R. 128). Plaintiff testified that this joint is "getting worse as time goes on" (R. 21).

He also testified that due to impure drinking water and improper food while at the battle front in France, he developed an abdominal disorder characterized by cramps, diarrhea, nausea, and vomiting, and that on one occasion he inhaled a small amount of poison gas which affected his stomach (R. 25). He further testified that these abdominal symptoms had recurred periodically "one a month or two or three months" to the present time, because of which he had been required to observe a restricted diet and resort to such treatment as salts,

mineral oil and pills (R. 77). The only diagnosis of this condition, made on July 2, 1924, was possibly appendicitis and colitis, which, it was testified, often follows dysentery (R. 118). Dr. Claiborn, plaintiff's witness, testified that since plaintiff's return from service he prescribed for his stomach trouble two or three times each year and that except upon one occasion it has always been for "more or less trivial conditions, * * * constipation or a more or less minor ailment" (R. 156). It does not appear that subsequent to his military service he has had any other medical treatment for any purpose.

While there is lay testimony that plaintiff was pale, thin and nervous at the time he returned from the Army (R. 56, 131, 141, 144, 150), and a notation on his discharge papers described his physical condition as "Poor" (R. 44), there is no testimony as to any subsequent nervousness, and when examined on July 2, 1924, he was found to be of "good general appearance, nutrition and musculature good. * * * no particular drawing of the face or signs of any great pain" (R. 120-121).

Except for the loss of the left leg, he claimed no disability in his application for compensation executed on August 18, 1919 (R. 62), nor on an inquiry regarding his insurance on December 18, 1919, though on this occasion he did mention certain "minor injuries about the face" (R. 67). On September 10, 1919, in an application for vocational training, he represented that except for the loss of the left leg he was "Otherwise in good health" (R. 85), and in applying for reinstatement of

his insurance on July 6, 1921, he certified "I am now in good health" (R. 72). In July, 1924, and October, 1926, he declined requests to report for treatment because "I can not possibly leave my ranch at this time since I can not hire any one to take care of it for me" (R. 80), and "I am trying to make final proof on my homestead, and it will be coming up November 29th, and * * * I would prefer to wait till after that time" (R. 82).

He testified that upon his discharge from the Army he returned to Montana and lived for several months with various neighbors doing no work (R. 32), after which he was in vocational training in agriculture for three months (R. 35) until he quit of his own volition because, he testified, "I was unable to take that type of instruction" and "I just got disgusted" (R. 35). He attributed his difficulty in vocational training to his limited knowledge of the English language (R. 33), but it appears that preliminary courses in reading, writing and arithmetic were available to him (R. 90, 95, 114), and that he then stated that he could read newspapers and write letters in English (R. 85). When he ceased vocational training he signed a statement that he was voluntarily resuming compensation status in preference to his training status (R. 89), and though he testified that he did not understand the meaning of some of the words in that statement (R. 114), he knew that his training pay of $100.00 per month would cease, in lieu of which he would receive compensation (R. 87), which

had been only $30.00 per month prior to vocational training (R. 172).

Thereafter he lived with his cousin for a month and with one Myrstol for about a year, doing little work (R. 35-36). He then moved to a homestead upon which he had filed prior to service (R. 37), and during the following six months "proved up" on this place and secured title. During the year and a half that succeeded he lived upon the farm of one Terland. He testified that he did very little work during this time (R. 37). About 1924 he bought a ranch of 325 acres for $2,500, ultimately relinquishing his homestead in lieu of $2,400 of this purchase price. He has lived upon this ranch since 1924, since which date he has purchased more land (R. 38), so that at the time of trial he owned 749 acres (R. 103). There is testimony that the manual labor required on his ranch has been done by hired help (R. 39-40, 135, 145-146). However, he has upon occasion driven a derrick team (R. 135); milked gentle cows; driven an automobile; done light chores (R. 151), and ridden horses (R. 145). In addition thereto he has always managed and directed the farm activities (R. 103). One witness for plaintiff testified as follows:

> I have cultivated that land myself, and it has been under the supervision and direction of Thompson. He has told me how to do it. From what I have observed, it appears to me that he knows how to operate that property and give directions for its proper management. He knows how the soil should be tilled to raise a crop. He can direct the men what to do in order to farm it. He can do that, ac-

> cording to my observation and he has done it for years. He has managed and supervised that property. (R. 149).

There is opinion testimony that plaintiff's land does not afford adequate opportunities for earning a livelihood (R. 148), but he has built a house and barn thereon; fenced most of the 749 acres (R. 104); built an irrigation ditch approximately three miles long; acquired ordinary farm equipment, including mowers, a rake, plow and harrow, in addition to teams and harnesses (R. 108); a few sheep and chickens (R. 104); a Pontiac touring car and a Chevrolet truck (R. 105), and commencing with two head of cattle when he purchased his farm in 1924, he had more than forty head at the time of trial, though he has sold some from year to year (R. 102-103). It was testified by a witness for the plaintiff:

> As to the kind of buildings, etc., his place appears good. They are well kept up. His crops appear to be well cultivated, and the entire ranch appears as though it is properly operated. I would say that the crop produced each year on the land that is cultivated is a good a crop as is produced on like land around in the community by the other farmers. (R. 149).

Since 1920 he has maintained a bank account (R. 171). The deposits therein indicate an income of some $10,000, in addition to amounts received as compensation (R. 173) and soldier's bonus, and through inheritance and unpaid loans (R. 180). This is based upon the assumption that all of his compensation was deposited in the bank, though there is no evidence to that

effect. Neither does it appear that all other income was deposited in this account.

The officials of his bank considered his credit rating good (R. 139), it being testified by the President of that institution that "We have made any loans he ever asked for" (R. 178).

DISCUSSION

There is nothing in the record opposed to the testimony of Dr. Claiborn, plaintiff's witness, who had observed his abdominal condition periodically from 1919 to the date of trial, that it was "more or less trivial" (R. 156). In fact, this testimony is corroborated by plaintiff's failure to mention this ailment upon the several occasions when he was required to list all of his disabilities. In his own mind it seems to have been subordinated to certain "minor injuries about the face," which he reported on December 18, 1919 (R. 67). Subsequent to the claimed injury to his right knee he did regular Army service for about six months without reporting this condition or receiving any treatment therefor, and it seems clear that the disabling effects were at most only slight at any time during the period of insurance protection. An examination as late as 1934 revealed no serious impairment of this joint, even though, as plaintiff testified, "It is getting worse as time goes on."

Furthermore, it cannot be ascertained from the record that either of the foregoing conditions would not have yielded to treatment and in the absence of such evi-

dence there is no basis for an inference that even their slightly disabling effects were permanent.

Deadrich v. *United States,* 74 F. (2d) 619 (C. C. A. 9th);
United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

As to plaintiff's principal disability, it has been judicially noticed that there are many occupations open to men who have suffered the loss of one leg.

United States v. *Mayfield,* 64 F. (2d) 214 (C. C. A. 10th);

See also

United States v. *Adcock,* 69 F. (2d) 959 (C. C. A. 6th);
United States v. *Harris,* 66 F. (2d) 71 (C. C. A. 4th);

This would seem to be particularly applicable to the present case, wherein it was shown that the stump was well healed and the artificial limb well fitted. Moreover, the plaintiff has demonstrated his ability to follow a gainful occupation despite his admitted disability. For more than ten years he has superintended and managed a ranching enterprise with financial success at least comparable to that achieved prior to service, although precluded by his injury from the performance of manual labor.

Cf.

United States v. *Green,* 69 F. (2d) 921 (C. C. A. 8th);

United States v. *Steadman,* supra;
Harris v. *United States,* 70 F. (2d) 889 (C. C. A. 4th);

Furthermore, recovery under a contract of war risk term insurance must be predicated upon proof that the insured could not have followed any substantially gainful occupation.

Miller v. *United States,* 294 U. S. 435, rehearing denied, 294 U. S. 734;
United States v. *Mayfield, supra;*
Hanagan v. *United States,* 57 F. (2d) 860 (C. C. A. 7th).

There is evidence indicating that plaintiff had native capacity to follow other occupations than farm supervision if such adjustment had been required by his disabilities. In fact, vocational training with pay was provided by the Government and voluntrily discontinued. There is no explanation of why he did not attempt to adapt himself to other occupations except that his farming activities were producing satisfactory results.

Cf.

United States v. *Jones,* 73 F. (2d) 376 (C. C. A. 5th).

CONCLUSION

It is respectfully submitted that the trial court erred as herein assigned and that the judgment should be reversed.

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January, 1937.